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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 15, 1996

The Honorable W. Barney Giese
Solicitor, Fifth Judicial Circuit
Post Office Box 1987
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Solicitor Giese:

You have requested an opinion concerning "whether or not it is allowable for a municipality to pass an ordinance that allows the municipality to charge a $35.00 fee for the administrative costs that are associated with the processing of expungement orders." You state that

> [a]s you know, a defendant is permitted to obtain an order for the destruction of his/her arrest record under several sets of circumstances. These orders must be filed with various law enforcement agencies, including the local arresting agency. There are, of course, costs associated when any filing mechanism is triggered. The county clerk of court currently charges a $35.00 fee to file these orders.

LAW/ANALYSIS

Recently, in Hosp. Assn. of S.C. v. County of Chas., et al., 464 S.E.2d 113, 116 (1995), our Supreme Court stated that "[d]etermining if a local ordinance is valid is essentially a two-step process." Said the Court,

> [t]he first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no

> such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State.

414 S.E.2d at 117. The Court further recognized that with the adoption of Article VIII of the Constitution, local governments such as municipalities must be given "home rule" authority.

> As ratified, new Article VIII directed the General Assembly to implement what was popularly referred to as "home rule" by establishing the structure, organization, powers, duties, functions and responsibilities of local governments by general law. S.C. Const. art. VIII, Secs. 7 and 9. In addition, new Article VIII mandated a liberal rule of construction regarding any constitutional provisions or laws concerning local government. S.C. Const. art. VIII, Sec. 17.

Further noting that Section 5-7-30 implemented the Article VIII mandate with respect to municipalities, the Court eschewed a strict or narrowing construction of the powers of such political subdivisions:

> [a]lthough Sec. 5-7-30 lists various specific powers possessed by municipalities, we hold that the broad grant of power stated at the beginning of the statute is not limited by the specifics mentioned in the remainder of the statute. To hold otherwise would directly contradict S.C. Code Ann. Sec. 5-7-10 (1976), which states that "the specific mention of particular powers shall not be construed as limiting in any manner the general powers of ... municipalities." Further, a limited reading of Sec. 5-7-30 is inconsistent with the liberal rule of construction mandated by Art. VIII, Sec. 17.

464 S.E.2d 118.

Thus, applying the rule in the Hosp. Assn. case that municipalities possess sufficiently broad authority to adopt ordinances in virtually any area "unless inconsistent with the Constitution or general law of this State", the issue is whether the kind of ordinance you describe can be said to be contradictory either to the Constitution or general

law. Of course, in reviewing the constitutionality or validity of an Ordinance, this Office has recognized on numerous occasions that

> [a]n ordinance, if it should be adopted, would be entitled to the same presumptions of constitutionality to which an enactment of the General Assembly would be. It would be presumed that the ordinance would be constitutional in all respects. The ordinance will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Cf., Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office advises whenever it may identify a particular constitutional infirmity, it is solely within the province of the courts of this State to actually declare an enactment or ordinance unconstitutional or unenforceable for other reasons.

Op. Atty. Gen., August 1, 1994. See also, So. Bell Tel. and Tel. Co. v. City of Sptg., 285 S.C. 495, 331 S.E.2d 333, 334 (1985) ["(a)n ordinance is a legislative enactment and is presumed to be constitutional. The burden is on the taxpayer to prove unconstitutionality beyond a reasonable doubt."].

Article V of the South Carolina Constitution mandates a unified judicial system in this State. As our Supreme Court stated in Cort Industries v. Swirl, Inc. 264 S.C. 142, 213 S.E.2d 445, 446 (1975),

> [t]he people in approving Article V mandated a uniform system of courts for the administration of justice in South Carolina. Section 1 of that Article reads:
>
> > "The judicial power shall be vested in a Unified judicial system, which shall include a Supreme Court, a Circuit Court, and Such other courts of uniform jurisdiction as may be provided for by general law."

And in Douglas v. McLeod, 277 S.C. 76, 282 S.E.2d 604 (1981), the Court emphasized:

> [w]e have also held that the establishment of a uniform judiciary is mandatory and that statutes which extend or perpetuate a non-unified system or which operate so as to postpone or defeat the purpose of Article V must be deemed unconstitutional. State ex rel. Riley v. Pechilis, 273 S.C. 628, 630, 258 S.E.2d 433; [State ex rel McLeod v. Crowe, 272 S.C. 41, 48, 249 S.E.2d 772]; State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 291, 223 S.E.2d 166; Cort Industries Corp. v. Swirl, Inc., 264 S.C. 142, 146, 213 S.E.2d 445.

Likewise, the Court has recognized that the Constitution forbids piecemeal regulation of the court system by local governments. In striking down an act delegating to the counties the authority to fix magisterial salaries, the Court reasoned that

> ... the delegation of power brought about by Section 22-2-180, Code, clearly disregards the fundamental principle that such delegations to county authorities are appropriate only for the regulation of local matters. 16 C.J.S. Constitutional Law Section 140(c), p. 663; Sutherland on Statutes and Statutory Construction, 4th Edition, Section 4.07, p. 80; Gaud v. Walker, 214 S.C. 451, 462, 53 S.E.2d 316. Along with the revised Article V of the South Carolina Constitution, the people of this State also adopted an amended Article VIII, concerning local government. Section 14 of this Article provides that, in the enactment of provisions authorized thereunder, the general law provisions applicable to certain matters shall not be set aside. Among those enumerated are the following:
>
> (4) the structure for the administration of the State's judicial system;
>
> (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.

> Paragraph 14(4 and 6) of Article VIII effectively withdraws administration of the State judicial system from the field of local concern. The conclusion is, therefore, inescapable that Section 22-2-180 works an impermissible delegation to local authorities of a power which now can only be exercised by the General Assembly.

Moreover, the Court has applied these principles specifically to court fees. In State ex rel. McLeod v. Crow, supra, the Court concluded:

> [t]he third question to be considered is whether the fees charged in magistrate courts must be uniform throughout the State. Statutes have been enacted for several counties establishing different fee schedules for the magistrate courts.
>
> Legislation establishing disparate fee schedules for magistrate courts over the State conflicts with the uniformity requirements of Article V. Section 23 of Article V, interpreted in conjunction with Section 1 of that Article, empowers the General Assembly to provide for the jurisdiction of magistrates in a uniform manner only. The exercise of such jurisdiction is materially affected by the fees allowed to be charged or assessed. Since the fees for magistrate courts affect the exercise of jurisdiction, they must be enacted on a uniform basis.

Turning to your specific situation, you wish to know whether a municipality may "charge a $35.00 fee for the administrative costs that are associated with the processing of expungement orders." You note that the clerk of court currently charges a $35.00 fee to file these orders. Section 8-21-310 (21) provides as follows:

> [e]xcept as otherwise expressly provided, the following fees and costs must be collected on a uniform basis in each county by clerks of court and registers of mesne conveyances or county treasurers as may be determined by the governing body of the county:
>
> ...(21) for filing and processing an order for the Destruction of Arrest Records, thirty-five dollars, which fee must be for each order regardless of

> the number of cases contained in the order. The fee under the provisions of this item does not apply to cases where the defendant is found not guilty or where the underlying charge is dismissed or nol prossed unless that dismissal or nol prosse is the result of successful completion of a pretrial intervention program. (emphasis added).

Consistent with Section 8-21-310 (21)'s requirement that uniform fees in each county be charged for "filing and processing" expungement orders, courts in other jurisdictions have recognized the expungement process as one being judicial in nature and requiring a uniformity and statewide consistency. For example, in Police Commr. of Boston v. Munic. Ct. of the Dorchester Dist., et al., 374 N.E. 272 (Mass. 1978), the Court noted that the "power of a court in such circumstances [expungement] is not dependent on its possession of general equity powers ... but is an incident of an ancillary to the court's original jurisdiction." 374 N.E.2d at 285. (emphasis added).

Moreover, in People v. Valentine, 50 Ill.App.3d 447, 365 N.E.2d 1082 (1977), the Court commented with respect to the authority of a municipality to adopt an ordinance regulating expungement of arrest records. Said the Court,

> [t]he city of Carbondale is a home rule municipality. It has broad powers to enact ordinances regulating its own affairs in matters relating to public health, safety, morals and welfare ...; however, the statute here under consideration is an integral part of the comprehensive law of Illinois dealing with criminal law and procedure, specifically criminal identification and investigation ... and is a traditional area of statewide legislation and concern. The city suggests that the statute is in conflict with a city ordinance, although no ordinance conflicting with section 5 has been called to our attention. If such an ordinance does exist it must yield to the supremacy of State law in an area where, by the nature of the subject matter and *its comprehensive regulation by the State for many years*, State power to act must be deemed exclusive. In other words, this is not an area pertaining to the government and affairs of the city, and therefore, an appropriate subject for the exercise of municipal home rule power. We would note that the expungement provisions of the statute are concerned with the

> right of privacy of all persons, regardless of residence or place of arrest ... . [citations omitted; emphasis added]

We have applied these principles requiring uniformity in our court system pursuant to Article V of the Constitution to numerous fee structures. In Op. Atty. Gen., June 28, 1977, we said, for example:

> [i]n the very recent cases of Cort Industries, Inc. v. Swirl, Inc., 264 S.C. 142, 213 S.E.2d 445 (1975), State ex rel. McLeod v. Knight, ---- S.C. ----, 216 S.E.2d 190 (1975), State ex rel. McLeod v. Civil and Criminal Court, ---- S.C. ----, 217 S.E.2d 23 (1975) and State ex rel. McLeod v. Court of Probate of Colleton County, ---- S.C. ----, 223 S.E.2d 166 (1975), the Court has held and recognized that Article V of the Constitution mandates a statewide unified judicial system. This constitutional provision and the Court's decisions firmly establish the policy that the judicial system throughout the State be the same from one county to another. The unified court system mandate clearly destroys any rational basis for a classification that would allow one county to have a different fee schedule than another for the same services.
>
> Therefore, it is the opinion of this Office that all fee schedules used in the various counties based upon ordinances and special statutes are unconstitutional and that the only fee schedule available for the services enumerated is to be found under South Carolina Code Section 27-53 (1976)[replaced by Act No. 164 of 1979].

Other opinions of this Office are in accord. An opinion dated June 19, 1984 dealt with the constitutionality of a proposed bill relating to court libraries. County governing bodies would have been authorized to add costs upon any forfeiture of bond in magistrates' courts or when a fine was imposed and collected in that court. We concluded that affording the counties the discretion to adopt an ordinance imposing such costs inevitably led to non-uniformity in the court system. We believed

> [s]uch disparate treatment is in apparent violation of Article V of the South Carolina Constitution (1895 as amended) which requires a uniform judicial system. State ex rel. McLeod v. Crowe, 272 S.C. 41, 249 S.E.2d 772 (1978). While the

> Crowe case related to fees collected by magistrates, this office has concluded that the requirements of Article V relate also to fines, Op. Atty. Gen., March 2, 1981, and we see no reason why forfeitures would not be included as well.

Moreover, in an Opinion dated September 15, 1986, we concluded that while we possessed no authority to declare a county ordinance which taxed certain defendants found guilty in magistrates' courts unconstitutional, such ordinance was thought to most probably contravene Article V of the South Carolina Constitution. Furthermore, a March 17, 1988 Opinion found that the practice of imposing by municipal or county ordinance costs in magistrates' courts beyond those authorized by state statute would violate Article V.

In an Opinion dated March 31, 1988, we addressed the issue of whether a municipality could add a surcharge to all uniform traffic tickets resolved in the municipal courts. Citing many of the foregoing opinions as authority, we stated:

> [c]onsistent with the above, it appears that an ordinance of a single municipality establishing an administrative penalty for controlled substance violations which would be used in investigating and prosecuting narcotics violations would be of doubtful constitutionality in light of the provisions of Article V of the State Constitution. However, only a court could make such a determination.

Likewise, we have deemed the imposition of an administrative penalty of $100.00 for controlled substance violations by municipal ordinance likely conflict with the constitutional requirement of a unified judicial system. Op. Atty. Gen., August 9, 1988.

Based upon the foregoing wealth of authorities, I would advise that an ordinance imposing a $35.00 fee for the administrative costs associated with the processing of expungement orders appears to be constitutionally questionable. As noted above, Section 8-21-310 (21) requires uniform fees in each county for the "filing and processing of expungement orders." This statute represents an effort by the General Assembly to establish a uniform fee and cost system consistent with the unified judicial structure. Decisions by our Courts and opinions of this Office have uniformly advised that individual county or municipal imposition of fees upon various aspects of court functions would contravene Article V of the Constitution. Moreover, as also seen earlier, the process of expungement is a matter which has typically been viewed as one of statewide, rather than

local concern. The various state statutes dealing with expungement, see e.g. §§ 22-5-910, 17-1-40, 34-11-90, do not authorize political subdivisions to impose additional fees upon the expungement process.

Of course, this Office must presume the constitutionality and validity of any municipal ordinance. We cannot declare any ordinance to be unconstitutional, but can only point out the legal and constitutional problems to which an ordinance or statute would be subjected if adopted or enacted. There is, to my knowledge, no South Carolina case precisely relating to your situation. However, based upon the foregoing, I would advise that the type of ordinance described in your letter would be subject to constitutional challenge. Whether or not the additional fee for the administrative costs connected with expungement would be charged, would be dependent upon whether a particular municipality or county had chosen to impose such a fee, thereby creating a non-uniform system. Thus, prior to any implementation of such a fee, I would further advise that a declaratory judgment be undertaken to determine the validity of said ordinance. Questions of statewide importance such as this should be decided by the courts prior to being put into effect.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph